February 17, 2005

Mr. Andrew Fisk
Bureau of Land & Water Resources
Maine Department of Environmental Protection
17 State House Station
Augusta, Maine 04333

Re: Gulf Island Pond Draft TMDL

Dear Mr. Fisk:

CLF is pleased to comment on Maine Department of Environmental Protection's draft TMDL for Gulf Island Pond. CLF is a nonprofit, member-supported organization with offices in Maine, Massachusetts, New Hampshire, Rhode Island and Vermont. CLF has advocated for New England's environment since 1966, working to protect the region's people, natural resources and communities. We have long worked to protect water quality throughout New England by helping states design and implement strong TMDLs designed to bring our region's waters into compliance with water quality standards.

While we complement Maine DEP on its research and monitoring of poor water quality in Gulf Island Pond, we have several concerns regarding the draft TMDL. As an initial matter, a TMDL must set specific waste load allocations that will result in attainment of state Water Quality Standards (WQS), plus a margin of safety. 33 U.S.C. § 1313(d)(1)(C). It is unclear why DEP has only proposed "sample waste load allocations." DEP may not defer to later negotiations with the dischargers to determine allocations. DEP has already delayed far too long from its statutory mandate to enforce WQS on the Androscoggin – this poor tactic will only lead to further delay in cleaning up the river. DEP must set license limits and needs to move forward immediately.

Dissolved Oxygen WQS

Regarding the TMDL limits for BOD-5, the draft applies an illegal and inadequate standard for dissolved oxygen (DO) which would not result in attainment of state WQS and would therefore not meet the requirements of the Clean Water Act. As you know, last year, the Maine legislature enacted revisions to Class C WQS for dissolved oxygen that would have set a monthly average DO criterion of 6.5 ppm at 22° Celsius. DEP, however, withdrew those proposed revisions from EPA review due to an error in the statute. Under the Alaska Rule, modifications to state WQS are legally ineffective unless approved by EPA. See, e.g., 40 C.F.R. § 131.21(c). Thus, the draft TMDL must be revised using the prior narrative standard. See 38 M.R.S.A. § 465(4)(2004) (require that Class C waters "be of such quality that they are

14 Maine Street, Suite 200, Brunswick, Maine 04011 • 207-729-7733 • Fax: 207-729-7373 • www.clf.org

MASSACHUSETTS: 62 Summer Street, Boston, MA 02110-1016 • Phone: 617-350-0990 • Fax: 617-350-4030
NEW HAMPSHIRE: 27 North Main Street, Concord, NH 03301-4930 • 603-225-3060 • Fax: 603-225-3059
RHODE ISLAND: 69 Washington Street, Providence, RI 02903-1726 • 401-323-7608 • Fax: 401-351-0118
VERMONT: 15 East State Street, Suite 4, Montpelier, VT 05602-3010 • 802-223-5992 • Fax: 802-223-0060

suitable for the designated uses of . . . fishing . . . recreation in and on the water . . . and as habitat for fish and other aquatic life").

Historically, DEP has applied a monthly average DO criterion of 6.5 ppm at all temperatures as the numerical criterion necessary to comply with the narrative standard at § 465(4). CLF agrees that this criterion would comply with the existing narrative standard and would support existing and designated uses of Gulf Island Pond – and therefore is an appropriate standard to use in this TMDL.

DEP has recently proposed to change its numerical DO criterion so that it would only apply at 24° C. While we withhold judgment regarding whether a monthly average DO criterion at 24° C. is sufficient to meet the narrative standard and support existing and designated uses, we note that DEP and other agency biologists have concluded that anything less than 24° C. would be insufficient. See, e.g., Maine DEP Report to the 121st Legislature Joint Standing Committee on Natural Resources (January 5, 2004). Thus, applying the lower DO criterion – the 22° C. standard used in the TMDL – would most certainly not meet the narrative standard or support existing and designated uses. Modeling runs conducted by DEP prove that point: tests by Paul Mitnik found that easing of the monthly average DO criterion from 24° C. to 22° C. would result in a 30 percent change in waste load allocations assigned to the paper mills that are the largest contributors to water quality problems in Gulf Island Pond. Thus, the proposed BOD-5 limits are off by at least 30 percent, and must be revised.

Phosphorous

CLF is also concerned that DEP's phosphorus modeling overestimates the volume of phosphorous that can be discharged by the upstream mills without causing algal blooms in Gulf Island Pond. DEP has apparently allowed for significant uptake of phosphorus in the river before mill discharges reach the pond. We disagree with this assumption. Phosphorus taken up by plants in the river above the pond will eventually move downstream as plants die off and will accumulate in Gulf Island Pond, where it will be available for algae blooms. Additionally, there is a significant problem of historic phosphorous loading, which reduces the likelihood that the upstream river can permanently remove this much phosphorous. This underscores the need for DEP to apply conservative margins of safety. Thus, we believe that significantly lower phosphorus limits are required.

Total Suspended Solids

We disagree that the 2002 aquatic life non-attainment data in the Livermore Falls impoundment are an anomaly. DEP has only five summers worth of data: it may not simply dismiss the worst summer as an anomaly, particularly where the summer dismissed had the lowest flows recorded. Therefore, the TMDL must readjust its TSS figures.

Sincerely,

Steve Hinchman
CLF Staff Attorney